

DECLARATION OF MICHAEL ORCUTT RE
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION - 1

1 I, Michael Orcutt state and declare as follows:

2 1. I am a fisheries biologist and an enrolled member of the Hoopa Valley Tribe
3 (Tribe). I am presently employed by the Tribe, located on the Hoopa Valley Indian Reservation
4 in Northern California, where I continue my tenure of over 35 years as Director of the Fisheries
5 Department.

6 2. In my work with the Hoopa Valley Tribe Fisheries Department, and in my role as
7 Fisheries Director, I am intimately involved and have substantial personal knowledge of fisheries
8 management issues in the Trinity River Basin, including operations of the Trinity River
9 Restoration Program (TRRP) and Trinity Management Council (TMC), and implementation of
10 the 2000 Trinity River Record of Decision (ROD). My professional duties include representing
11 the Hoopa Valley Tribe before state and federal agencies and the U.S. Congress in matters
12 involving restoration of the Trinity River fishery. I also have fished and hunted on the Hoopa
13 Valley Reservation for most of my life and I have witnessed the devastation that the Trinity
14 River Division of the CVP has had on the fishery resources that the Hupa People have depended
15 upon since time immemorial.

16 3. On January 30, 2023, Defendants approved the Trinity River Winter Flow
17 Variability (WV) Project, which will shift and re-allocate substantial amounts of water (60,000
18 Acre Feet to 220,000 Acre Feet) for release in winter months. This water to be released is
19 currently allocated for fishery restoration releases in Spring/Summer months pursuant to the
20 prescriptions of the ROD which are based on comprehensive scientific analysis in the 1999
21 Trinity River Flow Evaluation Report (the "Flow Study"). According to Defendants, the WV
22 Project is scheduled to commence on February 15, 2023.

23 4. While the WV Project, as designed, calls for increased flow releases between
24 December 15 and February 15 of the 2023 water year (known as the "Flow Synchronization
25 Period"), those flow releases did not occur this year because the Defendants did not approve the
26 WV Project until January 30, 2023 and will not commence implementation until February 15,

2023. Thus, the WFV Project water will now be released as “elevated baseflow” through April 15, 2023 according to the letter sent by the TMC on December 9, 2022. Exhibit 1.

5. A TRRP notice issued on or around February 10, 2023 confirms the Defendants will elevate base flows from February 15 through April 15, and also provides detailed daily information about the currently planned flows through March 14. The authorized daily flows are more than double the amount authorized for those dates under the ROD. The notice confirms that “Dam releases are then likely to remain elevated above the 300 cfs baseflow until the spring flow release commences on or around April 15.” Exhibit 2.

6. The purpose of this declaration is to explain that the WFV Project is an unprecedented action that requires environmental review and public participation under NEPA and that the WFV Project, if not enjoined, will result in irreparable harm to the Trinity River, its fishery, and to the Hoopa Valley Tribe whose people rely on the fish of the Trinity River through exercise of their federal reserved fishing rights. Defendants have often conducted NEPA analysis to evaluate TRRP activities, including those under the ROD. But here, Defendants failed to conduct or complete NEPA analysis related to the WFV Project.

7. The WFV Project is not consistent with the requirements of the ROD or the supporting scientific analysis in the Flow Study. The Hoopa Valley Tribe was a co-author of the Flow Study. The Flow Study recommended a total minimum annual volume of water releases to the Trinity River dependent on water year type but also provided detailed recommendations for specific volumes of releases at specific times of year, along with a discussion of the purpose and benefits of providing those specific volumes at specific times. The Flow Study designed Trinity River Division (TRD) flow release schedules to restore, preserve and propagate natural fish production by reestablishing habitat for the life history stages of anadromous salmonids that inhabit the Trinity River.

8. The Flow Study, upon which the flow schedule in the ROD is based, is a holistic and comprehensive evaluation of the actions necessary to restore fish in the Trinity River, which

1 was based on decades of scientific review, and which remains the best available comprehensive
2 science regarding fishery restoration flows in the Trinity River.

3 9. The flow recommendations in the Flow Study were carefully developed by Hoopa
4 and its partner agency, the U.S. Fish and Wildlife Service, to achieve specific management
5 objectives and habitat restoration purposes on the mainstem Trinity River.

6 10. Specifically, Chapter 8 of the Flow Study (provided to the Court in Dkt. #138-1)
7 explains that the flows recommended in that document and approved in the ROD were carefully
8 designed to meet multiple inter-related management objectives. The Flow Study allocated the
9 limited available amount of water pursuant to a day-by-day flow schedule to achieve
10 management objectives and to ensure that those objectives were met at all times of the year.

11 11. Chapter 8 of the Flow Study contains tables that explain the specific management
12 targets, flow purposes, and flow benefits for recommended flows at each day of the year and for
13 each type of water year. The Flow Study is a carefully balanced analysis designed to maximize
14 benefits with available water at all times of year for different fish species and their life history
15 requirements.

16 12. The Flow Study allocated all available annual flow amounts in the recommended
17 flow regimes to meet the intended management objectives.

18 13. In other words, the timing of the flow releases (the time of year in which the
19 releases occur) is of critical importance to the effectiveness of the flows and to meeting the goals
20 and management objectives discussed in the Flow Study.

21 14. The Flow Study recommendations were adopted in the ROD, which was approved
22 by Secretary of the Interior Bruce Babbitt and which the Hoopa Valley Tribe concurred in,
23 through the signature of its Chairman Duane Sherman on December 19, 2000.

24 15. The ROD, pursuant to the recommendations in the Flow Study, sets a uniform
25 base flow of 300 cubic feet per second (cfs) across all water years for the time period of October
26 16 through April 1.

1 16. Since approval of the ROD, there has been no change to winter base flows
2 prescribed in ROD. Until now, the Bureau of Reclamation has strictly adhered to the October 16
3 through April 1 ROD flow schedule. To be clear, there has never been any modification or
4 alteration of winter base flows since ROD implementation began.

5 17. ROD TRD flow releases for each water year (October 1 to September 30
6 annually) are limited to a long term annual average water budget. That budget is further limited
7 by predicted annual hydrology. Annual hydrology estimates are based on California Department
8 of Water Resources Bulletin 160. The ROD has five annual hydrological categories: Extremely
9 Wet, Wet, Normal, Dry, and Critically Dry. The ROD assigns each water year type a volume of
10 TRD water. Pursuant to CVPIA § 3406(b)(23) the ROD used the best available scientific data to
11 quantify and allocate the annual water budget throughout each water year type. The ROD winter
12 TRD base flow allocation is a direct outcome of compliance with the CVPIA's best available
13 scientific data requirement. The ROD winter base flow enables higher flows to meet habitat
14 requirements in Spring and Summer months, after the water-year type is determined.

15 18. The water year type (i.e., extremely wet, wet, normal, dry, critically dry) is not
16 designated until April 1 of each year. Thus, shifting water that is intended for use after April 1 to
17 earlier winter months presents a significant risk that there will not be sufficient water available
18 for intended fishery purposes in later Spring/Summer months.

19 19. The ROD does not provide for supplemental flow releases during the October 16
20 through April 1 time period. Accordingly, increasing ROD base flows will decrease flows that
21 the ROD deems necessary for fishery restoration in other times of year.

22 20. The WFV Project, which is scheduled to commence on February 15, 2023 would
23 shift substantial amounts of water (60,000 Acre Feet to 220,000 Acre Feet) for use in winter
24 months. Since the total annual water volumes are fixed, and since all water is allocated to
25 specific purposes, the re-allocation of water to winter months will deprive other months of water
26

1 and undermine the management objectives recommended in the Flow Study and approved in the
2 ROD with Hoopa's concurrence.

3 21. The Defendants' proposed re-direction of 60,000 – 220,000 acre-feet of water
4 from assigned purposes in Spring/Summer months will significantly disrupt and undermine the
5 holistic benefits of the flows called for in the Flow Study and approved in the ROD.

6 22. The contention that such a significant and substantive revision to the flows
7 prescribed in the ROD could qualify as a mere refinement in the name of adaptive management
8 is incorrect and contradicted by the ROD itself. Page 12 of the ROD (discussing the flow
9 regime) states: "Based on subsequent monitoring and studies guided by the Trinity Management
10 Council, the schedule for releasing water on a daily basis, *according to that year's hydrology*,
11 may be adjusted but the annual flow volumes established in Table 1 may not be changed."
12 (emphasis added). In the preceding paragraph, the ROD states that the "annual hydrology
13 (water-year type) [is] determined as of April 1st of each year." Thus, the ROD itself is clear that
14 no changes to the flow schedule can be made, even in the name of adaptive management, until
15 after April 1 when the year's hydrology type is known.

16 23. I have been involved in implementation of the TRRP and the workings of the
17 TMC since their inception. Based on my decades of personal experience, I can report that the
18 WFV Project and its proposed shifting of substantial amounts of water releases from Spring and
19 Summer months to Winter months is without precedent in the history of the TRRP and
20 implementation of the ROD.

21 24. In my experience, the ROD flow releases have always been implemented
22 consistent with the ROD prescriptions described above (i.e., uniform winter flow of 300 cfs from
23 October 16 to April 1) so that any refinements to annual flow schedules only occur after April 1
24 when the water year type is known. There have never been modifications to the winter base
25 flows prescribed prior to April 1, until now. And there never has been a proposal to shift
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1 substantial water intended for post-April 1 uses to winter months – foreclosing the availability of
2 water necessary in Spring/Summer. The WFV Project is a significant modification of the ROD.

3 25. In contrast to the Flow Study, the WFV Project fails to provide a similarly
4 comprehensive approach and fails to completely evaluate how such flow modifications could
5 result in adverse effects to the Trinity River fishery if full amounts of water called for by the
6 ROD are not available in Spring/Summer.

7 26. To date, Defendants have not completed NEPA evaluation for the WFV Project.
8 Defendants commenced NEPA in 2021 by issuing a scoping notice and Draft Environmental
9 Assessment but then cancelled action on the WFV Project for the 2022 water year. On February
10 4, 2022, Reclamation published a status report on the EA for the WFV Project stating:

11 “Consideration of this action has been canceled.”¹ No further NEPA process has occurred for
12 the WFV Project in the 2023 water year. To my knowledge, Defendants did not issue a Finding
13 of No Significant Impact (FONSI) prior to approval of the WFV Project on January 30, 2023.
14 No FONSI was disclosed to the public. And Defendants have not prepared an Environmental
15 Impact Statement. Nor have Defendants provided any explanation to the public regarding their
16 failure to comply with NEPA prior to approving the WFV Project for the 2023 water year.

17 27. Defendants have previously maintained that NEPA compliance is required for
18 modifications to flow releases into the Trinity River, even where the purpose of such
19 modifications was to benefit fish. For example, in 2019, the TRRP rejected a proposal to modify
20 the ROD hydrograph to allow for a small pulse flow in September of that water year on grounds
21 that NEPA review had not occurred. Although there was compelling evidence suggesting a
22 portion of the annual hydrograph should be reserved for late September to provide for
23 distribution of fall Chinook natural area spawners, Defendants concluded that they did “not
24 believe that it is prudent to deviate from summer baseflow at that time of year until we have
25 conducted further NEPA review.” An April 9, 2019 e-mail from Mike Dixon, TRRP Acting
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¹ https://www.usbr.gov/mp/nepa/nepa_project_details.php?Project_ID=50427.

1 Executive Director, explaining the need for NEPA review prior to implementing the changed
2 flows is attached as Exhibit 3. In stark contrast, Defendants have failed to conduct or complete
3 NEPA analysis related to the WFV Project which is a much more profound departure from
4 traditional winter base-flows than was the 2019 example affecting fall-base flows.

5 28. In another action relating to protection of Trinity River salmonids, but occurring
6 outside of the ROD, Defendants also conducted NEPA compliance and prepared a FONSI prior
7 to changing the timing of prescribed “Flow Augmentation Releases” (“FARS”) in order to better
8 protect spring-run Chinook. The authorized release window for FARS was August 19 to
9 September 19, but Defendants conducted NEPA review prior to implementing releases outside of
10 that window to begin on August 1 of that year. The FONSI for that action is attached as Exhibit
11 4.

12 29. Defendants’ failure to conduct or complete NEPA analysis is also inconsistent
13 with prior conduct in which Defendants have conducted NEPA analysis and issued FONSIs for
14 TRRP activities, including those under the ROD. Examples include a FONSI issued by the
15 TRRP on May 3, 2021 regarding the Trinity River Channel Rehabilitation Site: Oregon Gulch
16 (River Mile 80.9 to 81.7); a FONSI issued by the TRRP on October 8, 2020 regarding the Trinity
17 River Channel Rehabilitation Site: Chapman Ranch Phase B (River Mile 83.5 – 83.8); a FONSI
18 issued by the TRRP on April 25, 2014 regarding the Trinity River Channel Rehabilitation Site:
19 Lower Junction City (River Mile 78.8 – 79.8); and a FONSI issued by the TRRP on May 24,
20 2013 regarding the Trinity River Channel Rehabilitation Sites: Douglas City (River Mile 93.6 –
21 94.6) and Lorenz Gulch (River Mile 89.4 – 90.2). See Exhibits 5 – 8. These NEPA compliance
22 documents and others are also available on the TRRP DataPort at the following site:

23 <https://www.trrp.net/library/?search=fonsi&abstract=1&sort=citation>.

24 30. Environmental analysis of the impacts of the WFV Project is imperative. For
25 example, removing significant amounts of water in Spring/Summer will likely impair
26 temperature criteria in warmer months, which will impair water quality and harm fish species.

As one example, spring Chinook adults mature and reside in the river from May to September so they will suffer from having less water, and correspondingly warmer water temperatures, in summer months. A comprehensive analysis is necessary to ensure that unintended consequences do not occur to the detriment of all species of anadromous fish in the Trinity River.

31. The temperature impacts from the WFV Project, and associated water quality impacts, may cause violations of water quality standards under the Clean Water Act. The Hoopa Valley Tribe has adopted the temperature standards from the ROD in its Clean Water Act water quality control plan for the mainstem Trinity River (Hoopa Valley Tribe, Water Quality Control Plan, Hoopa Valley Indian Reservation, Approved by EPA, 2002). These standards were designed and put in place to be protective of salmonid species and other ecological resources in the Trinity River.

32. Defendants claim that the WFV Project will benefit geomorphology and provide related benefits to growth and outmigration of juvenile fish, but geomorphology benefits are hard to determine. The associated benefits to growth and migration of fish are even harder to determine. And trying to define and assess any such benefits in a meaningful way after one-year of changes to flows is certainly impossible. Any attempt to reach a meaningful conclusion about the benefits of flow alterations on the basis of a one-year deviation from those established in the ROD cannot satisfy CVPIA § 3406(b)(23)'s "best available scientific data" standard on which Hoopa and the Secretary concurred in the ROD.

33. In addition, it is premature to consider approval of substantial modifications or revisions to the flow schedule provided in the ROD. For one reason, the work intended to be performed by the TRRP is far from complete. Many habitat restoration and rehabilitation projects remain unfinished. This is due in part to inadequate and declining federal funding of the program as well as the Interior Department's failure to meet its legal obligations related to Trinity River restoration as required by Congress.

1 34. Also, although the ROD was executed in 2000 by the Secretary of the Interior and
2 Hoopa's Chairman, implementation of flows did not begin until 2005 due to litigation filed by
3 water and power contractors. As a result, the period of record of implementation of ROD flows
4 is relatively limited, providing an inadequate timeframe to assess the success or failure of the
5 ROD flows. The effectiveness of such flows to achieve their goals has been adversely affected
6 by the delays and failures in completing anticipated restoration.

7 35. Since the initial proposal of the WFV Project, I have personally repeatedly
8 advised officials of the Department of the Interior and Bureau of Reclamation, and members of
9 the TMC, of Hoopa's objection and non-concurrence with the WFV Project.

10 36. Hoopa has informed the Secretary that the WFV Project does not comply with the
11 restoration program requirements in the ROD and has not undergone sufficient scientific and
12 technical review. There is a lack of data over a sufficiently diverse period of record to reach
13 conclusions on the progress of restoration. Reports are currently being prepared by federal and
14 tribal scientists and need to go through an interdisciplinary scientific process that will synthesize
15 accumulated information. The synthesis reports from that process will inform any refinements
16 that may be proposed to the restoration program.

17 37. Based on Hoopa's knowledge and experience, Hoopa believes that that the WFV
18 Project will significantly undermine and impair the ROD's goals and objectives by depriving the
19 river of allocated water in Spring and Summer. Once water is released in winter months under
20 the WFV Project, it will be lost permanently. If fishery managers determine later in the year that
21 water previously released in winter is necessary to meet management objectives in Spring or
22 Summer, it will be too late. That water will have already been used.

23 38. At the December 7 meeting of the TMC (an advisory body to the Secretary of the
24 Interior), I again voiced Hoopa's opposition and non-concurrence to the WFV Project. Despite
25 this opposition and Hoopa's non-concurrence, the TMC voted 7-1 in favor of recommending
26 implementation of the WFV Project, commencing in this current water year.

1 39. On December 9, 2022, I received a letter from the Chair of the TMC directed to
2 Defendant Ernest Conant, Reclamation California Great Basin Regional Director and Paul
3 Souza, US Fish and Wildlife Service Regional Director that included the TMC's recommended
4 2023 flow schedule incorporating the WFV Project. A true and correct copy of this letter is
5 attached as Exhibit 1. On January 30, 2023, Defendants approved the TMC recommendation.
6 The January 30 approval letter is filed at Dkt. #142, Exh. 36.

7 40. The WFV Project cannot be properly characterized as a mere refinement or
8 adjustment to the flow schedule; rather, it is a wholesale re-allocation of ROD flows and a
9 revision of the ROD itself. Pursuant to the WFV Project, between 16 – 27% of the entire annual
10 water volume under the ROD will be shifted from summer releases to winter releases depending
11 on water year type. This equates to a minimum winter release of 60,000 acre-feet in a critically
12 dry year to 220,000 acre-feet in an extremely wet year. This is an extremely substantial,
13 significant, and dangerous re-allocation and re-purposing of water and it is in conflict with the
14 Flow Study and the ROD. Since the final water year determination is not known until April 1,
15 releases will be made without having full information about what releases will be necessary or
16 allowable in Spring and Summer months. Once the water year is known, however, much of the
17 WFV Project releases will already have been made – and that water will no longer be available
18 for its intended purposes in later Spring and Summer months.

19 41. The government's contention that there will be sufficient water to achieve ROD
20 goals in Spring/Summer despite removing 60,000 – 220,000 acre-feet from that time period
21 defies logic and is not supported by scientific analysis in the government's documents. There is
22 no explanation as to what will happen if fish are suffering unanticipated or unintended
23 consequences from depriving the river of flows called for by the ROD in Spring/Summer. Once
24 that water is released down the river in the winter months, it is gone and not available for use
25 later in the water year. A full environmental impact statement is critical here to fully understand
26 and disclose the impacts. At minimum, a statement of the government's findings of no

1 significant impact (if that is what the government has found) and the supporting reasoning for
2 such a finding is required.

3 42. The contention that the WFV Project's substantial modification in flows is
4 comparable to adaptive management of sediment management or watershed restoration under the
5 ROD is not correct. Unlike the daily flow schedule prescribed in Appendix B of the ROD, the
6 ROD does not contain comparably detailed prescriptions for the other restoration components
7 like sediment management and watershed restoration.

8 43. Moreover, as described by the TRRP ([https://www.trrp.net/program-
9 structure/adaptive-management/](https://www.trrp.net/program-structure/adaptive-management/)), Adaptive Environmental Assessment and Management (AEAM)
10 is component of the TRRP that provides "interdisciplinary information for developing and testing
11 hypotheses regarding how the river is responding to restoration work undertaken by the TRRP . . .
12 The adaptive management process is systematically repeated through time as management actions
13 are adjusted to benefit the Trinity River and its fisheries." Hoopa concurred in the AEAM
14 component aspect of the TRRP because of its fundamental scientific importance to the long-term
15 integrity of the TRRP and the fishery restoration outcomes required by Congress and needed by
16 Hoopa. However, a 2017 independent evaluation of Reclamation's performance regarding
17 AEAM (Headwater Corporation. 2017. Final Report – Trinity River Restoration Program)
18 concluded that AEAM has not functioned as planned. Rather than address needed AEAM
19 refinements, Reclamation now uses the appearance of AEAM process to justify the WFV
20 Project.

21 44. The action at issue here (the WFV Project) is unprecedented and, based on my
22 decades of experience working on implementing the ROD, is not consistent with the ROD. The
23 WFV Project is a decision by the Department of the Interior/Reclamation to modify the ROD
24 and its prescribed daily flow schedules that are the product of decades of comprehensive
25 scientific analysis. This action must be evaluated consistent with NEPA requirements.

I declare under penalty of perjury under the laws of the United States of America that the foregoing statements are true and correct.

February, 2023.

Michael W. Gault

DECLARATION OF MICHAEL ORCUTT RE
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION - 13

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such to the attorneys of record.

/s/ Thane D. Somerville
Thane D. Somerville